No. 95-1766

In The

Supreme Court of the United States

October Term, 1995

LAW PRACTICE OF J.B. GROSSMAN, P.A.,

Petitioner,

versus

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER'S REPLY

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July 1996

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13 pp

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I. THE PETITIONER WAS NOT REQUIRED TO SEEK COURT AUTHORIZATION TO APPLY FUNDS UNDER THE DEFENDANTS' CONTROL AFTER THE TRO EXPIRED.

The District Court entered a TRO *ex parte* pursuant to Rule 65(b) and in doing so allowed a governmental taking which deprived the Defendants of their property rights. However, Congress also provided in Rule 65(b) the procedural protection that such TROs will expire unless a district court either obtains consent from the restrained party to extend the TRO or issues a preliminary injunction prior to the expiration of the TRO (which contains findings of fact and conclusions of law). The District Court did not act accordingly in this case. Notwithstanding, the petitioner was held in contempt for violation of an order that did not exist. After twenty days, there was no order in effect and the Petitioner was within its legal right pursuant to Rule 65(b) as interpreted by this Court in *Granny Goose Foods, Inc. v. Brotherhood of Teamsters Local No. 70*, 415 U.S. 423 (1974), to act in the best interest of its client upon the expiration of the TRO. Specifically, this Court has said:

> Even were we to assume that the District Court had intended by its June 4 order to grant a preliminary injunction, its intention was not manifested in an appropriate form. Where a hearing on a preliminary injunction has been held after issuance of a temporary restraining order, and where the District Court decides to grant the preliminary injunction, the appropriate procedure is not simply to continue in effect the temporary restraining order, but rather to issue a preliminary injunction, accompanied by

> the necessary findings of fact and conclusions of law. [At that point, this Court places a footnote, which reads in part:
>
> > . . . Where a temporary restraining order has been continued beyond the time limits permitted under Rule 65(b), and where the required findings of fact and conclusions of law have not been set forth, the order is invalid. [citations omitted.]]

Granny Goose, at 443. Such language directly contradicts the position of Respondent in its Responsive Brief, which was derived from the similarly erroneous holding of the Eleventh Circuit in this case, that notwithstanding *Granny Goose:*

> " . . . when the TRO was continued beyond the time permissible under Rule 65 it was to be treated as a preliminary injunction . . . The court reasoned that such treatment is 'especially appropriate where, as in this case, there has been notice to the parties, a full hearing on the preliminary injunction, and then a stated and clear decision from the bench to extend the terms of the restraining order indefinitely, that is, until the court notified the parties otherwise.' " (*citing* Pet. App. 5-6)

(Responsive Brief in Opposition to Petitioner's Petition for Writ of Certiorari ("Res. Brief") page 6.) The above statement of the Eleventh Circuit cannot be reconcilable with Rule 65(b) or the holding of this Court, from *Granny Goose* quoted above.

The *Granny Goose* ruling holds that without a **written** preliminary injunctive order a restrained party may "reasonably assume that the [TRO] has expired within the

time limit imposed by Rule 65(b)." The Petitioner specifically followed the authority of this Court in its interpretation of Rule 65(b). In the absence of a supplanting preliminary injunction, the Petitioner is required by its status as a member of the bar to act in its clients' best interests. Upon being informed by the Petitioner of the substance of Rule 65(b) and the holding in *Granny Goose*, the Defendants instructed the Petitioner to reclaim its property by paying the Petitioner's outstanding bill for fees and expenses advanced and to obtain the Defendants' property from third parties, such as the receiver, bank and landlord.[1],[2]

Respondent asserts that " . . . even if petitioner believed that extension to be inappropriate – petitioner's proper course was to challenge the district court's action on appeal, not simply to defy the court's order." (Res.

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[1] Petitioner appears to have been placed in a catch-22. Pursuant to its duty to put its clients in the most advantageous legal position at all times, Petitioner advised the Defendants of their right to their property should the TRO expire without the issuance of a preliminary injunction. If the Petitioner, upon the TRO's expiration, refused to transfer the funds per the Defendants insistence, Petitioner could have been liable for malpractice for its refusal to advance its clients' interests when it had the responsibility to do so.

[2] The funds in question were removed from Petitioner's general client IOTA trust account to an operating account that was open but not being used for any operating purpose. The account to which the funds in dispute were moved was then itself converted into another or separate IOTA account. The funds in question remained there, inviolate (with interest being paid to the Florida Bar) until, pursuant to an agreement with the Respondent and the consent of the Eleventh Circuit, moved to the receiver's account pending the outcome of this matter.

Brief, page 10). However, according to *Granny Goose*, there was no order in effect. The District Judge did not have authorization to order an extension without following Rule 65(b). As Justice Rehnquist stated in his concurrence in *Granny Goose*, " . . . there was no injunctive order in effect at the point in time the respondent's allegedly contemptuous conduct occurred." 415 U.S. at 444. Therefore, there was no reason to take an appeal.

Respondent also takes the position in its Brief and erroneously asserts that the Petitioner was disingenuous in filing the June 6, 1994 Defendants' Motion to Release Assets the same day that it transferred the Defendants' property. (Res. Brief, pages 3-4) When the TRO expired the Defendant directed the Petitioner to seek return of its property. The receiver, the bank and the landlord refused to respond to the Petitioner's request. As such, it sought the assistance of the District Court to inform the third parties that the TRO expired per Rule 65(b) and therefore no valid order existed prohibiting the Defendants from access to their property. Because the Defendants had control over the funds held in the Petitioner's trust account by virtue of the attorney client-relationship, the Defendants did not have to wait on the assistance of the District Court. Thus, when Petitioner sought the assistance of the District Court to obtain previously frozen assets, no judicial assistance was necessary to move Defendants' funds out of Petitioner's trust account.

II. RESPONDENT IMPROPERLY INJECTED CONSENT AS AN ISSUE IN THIS PETITION.

As a final point in its Responsive Brief, the Respondent contends that the Petition should be denied because the District Court found that the Petitioner consented to its extension of the temporary restraining order. (Res. Brief, page 12). However, the Eleventh Circuit did not uphold this finding. In the concurrence, *dubitante*, Judge Hill stated:

> The district court found that [Petitioner] consented to the extension of the TRO. The majority opinion, however, accept[ed] without comment [Petitioner's] contention that he [sic] did not. I concur in this conclusion and note that if [Petitioner] had consented to the extension, the TRO would have remained an unappealable interlocutory order. *Fernandez-Roque v. Smith*, 671 F.2d 426, 430 (11th Cir. 1982).

(Pet. Brief, App. 9, n.2). Consequently, consent is not an issue before this Court. Moreover, the District Court found consent on the basis that the Petitioner did not object to the Judge's unilateral extension of the TRO. The District Court determined that the Petitioner had an affirmative duty to object to the Court's oral ruling if it did not consent to an extension of the TRO. However, Rule 65(b) does not state that a restrained party must object to a unilateral extension of a TRO or the TRO is automatically extended. Rather, Rule 65(b) states, in pertinent part, that a TRO granted without notice

> . . . shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order,

> for good cause shown, is extended for a like period or **unless the party against whom the order is directed consents that it may be extended for a longer period.**" [emphasis added].

The intention and plain meaning of the Rule requires a district court to obtain the consent of the restrained party.

The District Court cited *Fernandez-Roque v. Smith*, 671 F.2d 426, 430 (11th Cir. 1982), for its consent finding. In that case the district court directly asked the restrained party whether it consented to an extension of the TRO past the statutory limit. In the case at bar, the District Court unilaterally extended the TRO, and later asked both parties in general if they had any "questions," to which both parties responded in the negative. Respondent's Responsive Brief, states, "[t]he district court then asked if either party had anything further *or* any questions, to which the petitioner replied, 'No, sir.'" However, the actual statement made by the District Court follows:

> COURT: The status quo remains until I rule on the substantive motion, which I will, I will rule now on the substantive motion to dismiss for lack of subject matter jurisdiction, and depending upon that ruling, I will then rule upon the request for preliminary injunction, as either moot, not warranted or warranted. All right? **Do you have anything further, questions that is?**
>
> DIVISION: No, sir.
>
> [PETITONER]: No, sir. (PI Tr. 252-253) (Emphasis supplied).

Thus, the District Court was not asking for the consent of the Defendants. The trial judge was making a general inquiry directed to both parties rather than a specific request of the Defendants for its consent to extend the TRO beyond the statutory limit.

Additionally, there was no need by the Petitioners to state any objection on behalf of its clients, the Defendants, or discuss Rule 65(b)'s time limitation because at that time the District Court invited the parties to submit briefs within 24 hours of the close of the preliminary injunction hearing. Judge Highsmith, the District Judge, stated,

> . . . since I am going to have to work more hours than I like to contemplate *in the next couple of days*, because I have other pressing matters to attend to, I am going to require that you, that is if you wish to be heard further, that you work a little extra hard yourselves. If you wish, you may submit written argument in this matter other than that which you have already submitted within 24 hours, i.e., by 5:30 let's say tomorrow afternoon.

(Tr. 252). This statement, coupled with the District Court's statement (in the quote found earlier in this brief) that it was going to rule "now" could not reasonably be anticipated by anyone to mean that an order was anything but imminent, or at least was going to be issued within the maximum ten days as permitted by Rule 65.

Notwithstanding its written March 13, 1995 opinion in the contempt matter, it is obvious that when issuing the preliminary injunction on June 7, 1994, the District Court did not believe the Petitioner consented to an

extension of the TRO. The Judge issued the preliminary injunction *nunc pro tunc* to a date within the twenty day limit of the TRO. There was no reason to do so other than to improperly relate the preliminary injunction back to a time before the TRO was thought to have expired. This act by the District Court is itself unlawful. In *Cypress Barn, Inc. v. Western Electric*, 812 F.2d 1363, 1364 (11th Cir. 1987), the Eleventh Circuit noted this improper use of the *nunc pro tunc* mechanism and stated that:

> the failure of a court to act, or its incorrect action, can never authorize a nunc pro tunc entry. If a court does not render judgment or renders one which is imperfect or improper, it has no power to remedy any of these errors or omissions by treating them as clerical mispri-

In this case, the District Court did what the court in *Cypress Barn* specifically prohibited. The Eleventh Circuit failed to consider this point. Had the District Court actually believed the Petitioner consented to an extension of the TRO there would have been no reason to issue the order *nunc pro tunc*.

Notably, it was apparent to the Respondent and the District Court appointed receiver that the Petitioner had not consented to an extension of the TRO. In correspondence between the parties after the injunctive hearing between May 17, 1994 and June 3, 1994, the dialogue centered around whether the parties should use a calendar or business day analysis to determine the TRO's duration. At no time prior to the Respondent's second *reply* brief before the District Court, did anyone argue

that Petitioner consented to an extension of the TRO on behalf of the Defendants. (R. 117).

Moreover, in the case at bar, it could be said the Defendants objected to jurisdiction with a vengeance beginning even before the bringing of a legal proceeding. The Defendants filed, *inter alia*, 1) an Emergency Motion to Vacate Order, or in the alternative, Modify and Clarify Order, and Request for Funds for Attorneys and Expert Witnesses, 2) a Motion to Dismiss for Lack of Subject Matter Jurisdiction, 3) a Motion for Preliminary Hearing on Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction, and 4) an Emergency Motion for Protective Order. These actions do not evince a penchant to consent.

The Eleventh Circuit properly set aside the consent issue in both the majority and concurrence opinions stating that no consent was provided. Thus, Respondent has improperly injected the issue into its Brief in Opposition.

III. PETITIONER NEVER RELIED UPON ITS RETAINER AGREEMENT AS SUPPORT FOR THE TRANSFER OF THE DEFENDANTS' FUNDS.

The Defendants' Retainer Agreement with Petitioner, provided that the Defendants' trust funds become non-refundable upon the filing of any asset freezing action. The trial judge *instructed* the parties to address the issue at the opening of the contempt hearing. The Respondent raises it again in its Brief. Yet, never in the judicial process did the Petitioner raise this argument or rely on the

non-refundable clause as support for the transfer of the Defendants' funds.

WHEREFORE, for all the reasons stated in the Petition for Writ of Certiorari and this Reply, Petitioner, Law Practice of J.B. Grossman, P.A., prays that this Court issue a Writ of Certiorari to review the decision of the Eleventh Circuit Court of Appeals which failed to follow the decision in *Granny Goose*.

Respectfully submitted,

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